87-728

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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

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WILLIAM DOUGHERTY
Petitioner

vs.

PARSEC, INC.

TRUCK DRIVER, CHAUFFEURS AND
HELPERS, LOCAL UNION NO. 100

and

THE SEABOARD SYSTEM RAILROAD
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Was it error for the Sixth Circuit to declare preempted under §301 of the Labor Management Relations Act (§301) Petitioner's state-law tort claim for interference with contract against a non-signatory to the labor contract?

2. May a claim for tortious interference with a labor agreement against a non-party be treated as an action arising under §301?

PARTIES TO THE PROCEEDING

The parties in this proceeding are Petitioner William Dougherty (Petitioner or Dougherty), Parsec Incorporated, his employer, Teamsters Local Union 100, and the Seaboard System Railroad.

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THE SEABOARD SYSTEM RAILROAD
Respondents

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed an Order of the United States District Court, Southern District of Ohio, Western

Division, dismissing Petitioner's state tort claim as preempted by federal labor law. Petitioner shows unto this Court:

OPINIONS BELOW

The order of United States court of Appeals for the Sixth Circuit, filed July 22, 1987, is attached hereto as Appendix A. The order of the United States District Court for the Southern District of Ohio was appended to the Sixth Circuit's decision as Appendix A and is attached hereto as Appendix B.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The decision sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit, dated July 22, 1987.

The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is 28 U.S.C. § 1254 which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

The statute which this case involves is 29 U.S.C. §185(a) which states:

"Suits for violation of contracts between an employer and a labor organization representating employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citzenship of the parties."

STATEMENT OF THE CASE

INTRODUCTION

This case presents two questions of first impression which impact greatly upon the individual rights of union employees.

The first concerns federal preemption under §301 of the Labor Management Relations Act, 29 U.S.C. §185. (§301). The Sixth Circuit held that §301 preempts a state-law tort claim for interference with employment and contractual relations, even though the claim was brought against a third party who was not a signatory to the agreement. In so doing, the Sixth Circuit ignored and misapplied the principles set forth by this Court in Allis Chalmers Corp. v. Lueck, 471 U.S. 202, 105 S.Ct 1904 (1985). Further the Sixth Circuit heavily relied on Satterfield v. Western Electric Co., 758 F.2d 1252 (8th Cir. 1985), a case which involved preemption under the National Labor Relations Act (NLRA). However, this Court has held that the factors examined in NLRA preemption are

irrelevant to the question of preemption under §301. Allis Chalmers, 471 U.S. at 213-214, n.9. The decision of the Sixth Circuit, therefore, should be reversed.

The second question is whether a claim for interference with a labor agreement against a non-signatory may be brought under §301. The Sixth Circuit held that §301 applies only to parties to the contract. Accordingly, Petitioner was denied any remedy under federal or state law and Seaboard, the interferor, was insulated from liability for its conduct. Other Circuits have recognized the harsh result caused by the Sixth Circuit's holding, and permit interference claims to be resolved under §301. There is, therefore, a split among the Circuit which this Court should resolve.

FACTS

The only facts before the lower courts were those stated in the complaint.

Petitioner Bill Dougherty (hereafter Petitioner or Dougherty) was employed by Parsec as a crane operator. Parsec and Teamsters Local 100 (Union) were parties to a collective bargaining agreement. Under which Dougherty could be terminated only for just cause. (Complaint, ¶9).

Parsec performs services for Respondent Seaboard System Railroad (Seaboard) by loading and unloading railroad cars. No collective bargaining agreement existed between the Union and Seaboard. At no time was Seaboard Dougherty's employer. (Complaint, ¶'s 6 and 7).

In April of 1985, Dougherty complained of hazardous working conditions at Seaboard to the Occupational Health and Safety Administration (OSHA). There was an investigation by OSHA. Parsec and Seaboard were aware that Dougherty had filed the complaint. (Complaint, ¶ 8).

On June 27, 1985, and as a result of Petitioner's conduct, Seaboard demanded that Parsec terminate him. Seaboard's direction was not motivated by any legitimate business reason.

Instead, Seaboard sought to retaliate against Dougherty for filing a complaint with OSHA, exercising his right to free speech, and complaining about unwarranted interference with company-union matters. (Complaint, ¶ 11).

Parsec followed Seaboard's request and did in fact discharge Dougherty on June 27, 1986. (Complaint ¶ 12).

Petitioner filed a grievance protesting the wrongful termination by Parsec, his employer. On July 18, 1985, a decision of the Joint Grievance Committee of the Teamsters and employers sustained the discharge. Petitioner filed suit under §301 of the LMRA against Parsec for breach of the labor agreement since the termination was without just cause. Dougherty also sued the Union for violation of the duty of fair representation. In addition, he alleged a pendant state-law tort claim alleging that Seaboard without justification, interfered with his employment and contractual relationship by demanding that Parsec fire him.

The United States District Court for the Southern District of Ohio, per Judge David Porter, dismissed Dougherty's tort claim against Seaboard as preempted by §301. That decision was affirmed on Appeal to the United States Court of Appeals for the Sixth Circuit by a 2-1 panel decision.

ARGUMENT: REASONS FOR ALLOWANCE OF THE WRIT

I. THE OPINION OF THE SIXTH CIRCUIT CONFLICTS WITH THIS COURT'S RULING IN ALLIS-CHALMERS v. LUECK

In Allis Chalmers v. Lueck, 471 U.S. 202, 105 S.Ct. 1904 (1985), this Court carefully examined the doctrine of federal preemption under §301 of the Labor Management Relations Act (§301), 29 U.S.C. §185(a). The Court announced the following rules to be applied by the lower courts:

1. Non negotiable state-law rights and obligations which exist independent of the labor agreement will not be preempted.

2. The goal of uniform interpretation of the terms of a labor agreement is important. However, if the state-tort claim does not require interpretation of the labor agreement, and is not substantially dependent upon

analysis of its terms, that claim will not be preempted.

3. State-law regulations which do not conflict with or frustrate the federal labor contract scheme will not be preempted.

4. Not every state-law claim that touches or concerns a labor agreement is automatically preempted. A case-by-case analysis is required doctrine whether the federal interest is merely peripheral.

The majority opinion of the Sixth Circuit ignores these principles. As demonstrated below, the Sixth Circuit has erroneously preempted a state-tort claim which will have no effect upon the labor agreement and the parties to that agreement.

A. There Is No Genuine Federal Preemption Issue Since Seaboard Is Not A Party To The Labor Agreement, Dougherty Has No Claim Under Federal Law, And His Sole Remedy Arises Under State Law.

§301 applies to claims founded directly on rights created by collective bargaining agreements.[1] Caterpillar v. Williams, 107 S.Ct 2425, 125 LRRM 2525 (1987). Federal law governs the relationships created by a collective bargaining agreement. Bowen v. United States Postal Service, 459 U.S. 212, 224-225 (1983). Disputes arising from those relationships are to be resolved by application of "an evolving federal

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[1] 29 U.S.C. §185 states:

> "Suits for violation of contracts between an employer and labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . . " (emphasis ours).

common law grounded in national labor policy." Allis Chalmers v. Lueck, 471 U.S. at 211, citing Bowen supra. Accordingly:

> "[Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort."

Allis-Chalmers, supra 471 U.S. at 211. (emphasis ours)

In this case, there is no real federal preemption issue under §301.

First, Seaboard is not a party to the labor agreement. A district court does not have jurisdiction under §301 over a nonsignatory.[2] Service, Hospital, Nursing Home and Public Employees Union, Local 47 v. Commercial Property Services, Inc., 755 F.2d 499, 506 (6th Cir. 1986),

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[2] There is a conflict among the circuits concerning this point. See Argument II at page 26.

cert denied 106 S.Ct 147. Seaboard possesses no contractual interest which Congress and federal law intended to protect and control under §301.

Second, Dougherty has no federal remedy against Seaboard. There is no claim against Seaboard for breach of the labor agreement, and thus, no remedy under §301. Typically, the preemption issue arises because an employee seeks to avoid narrow contractual or federal remedies against the employer or union. For example, other claims for tortious interference have been preempted because they were in reality actions against the employer for breach of contract, or against the union for violation of its duty of fair representation. See Hilliard v. Dobelman, 774 F.2d 886 (8th cir. 1985) (suit against three supervisors was in essence one for wrongful discharge); Peterson v. Airline Pilots Assoc., 759 F.2d 1161 (4th Cir. 1985) cert denied, 106 S.Ct. 312 (1985) (suit against union for interference merely restated claim for breach of duty of fair representation). Accord: Evangelistic v.

Inlandboatman's Union, 777 F.2d 1390 (9th Cir. 1985). In each case, the employee retained a remedy under federal law.

This case is different. Dougherty has not presented a contract claim in tort clothing. He has pursued his federal contractual remedies against Parsec, his employer. He has followed and exhausted the grievance procedure. Dougherty has only a state-law claim and remedy against Seaboard. There is no federal claim against Seaboard which supercedes the state tort claim. By holding Dougherty's claim for interference preempted, the Sixth Circuit has created an anomolous situation which extends the preemption doctrine beyond the point Congress intended:[3] Doughterty has no remedy under §301, but §301 bars his unrelated and independent state tort claims against a nonsignatory.

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[3] In Boys Markets Inc. v. Clerks Local 770, 398 U.S. 235 (1970), this Court held that "the Congressional purpose embodied in §301(a) was to supplement, and not encroach upon, the preexisting jurisdiction of sate courts." Id. at 245. (emphasis ours).

By failing to carefully examine the facts and circumstances of this case, the Sixth Circuit has denied Dougherty any recourse against Seaboard. Worse, Seaboard, by virtue of a labor agreement to which it is not a party, and for which it gave no consideration, is totally insulated from liability for its actions. Such a result never intended by Congress.

B. Dougherty's Claim Against Seaboard For Interference Arises Independent Of The Labor Agreement And Exists As A Matter Of Ohio Law.

In Allis Chalmers, supra, this Court held:

> "Therefore state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements."

Id at 471 U.S. at 213. The converse of this rule is that state law rights that exist independently of those arising through labor agreements will not

be preempted. In this case, Dougherty has alleged a pure tort which exists separate and apart from the labor agreement.

The complaint states a claim for tortious interference with Dougherty's "advantageous contractual and employment relationship with his employer, Parsec." Unlike benefits obtained through the bargaining process, the right to be secure in contractual, business or employment relations arises under Ohio law, Juhasz v. Quick Shops, Inc., 55 Ohio App.2d 51 (1977), Heheman v. E.W. Scripps Co., 661 F.2d 115 (6th Cir. 1981). In Ohio, the employment relationship is protected even in the absence of a contract. In Smith v. Klein, 23 Ohio App2d 148 (1985), the court stated:

> "On a policy level, this court is not inclined to declare 'open season' on those employees who do not have fixed-term contracts. An employee who is terminable at will may nonetheless justifiably expect that his continued employment depends upon the will of the employer, not upon the whim of an office Iago."

Id. at 148.

Dougherty and Parsec are entitled to protection from interference by outsiders by Ohio law, not the labor agreement. The duties imposed and rights established through the state tort do not arise because of any contractual term. Seaboard has an obligation and duty under Ohio law not to interfere with the relationship that exists between Dougherty and Parsec. Any liability that Seaboard incurs for interference will arise from its conduct as measured by principles of Ohio tort law, not because Parsec violated the labor agreement.

The Sixth Circuit ignored this Court's decision in Allis-Chalmers. It preempted a state law that proscribes the very conduct in which Seaboard engaged, and which establishes rights and obligations independent of the labor contract. Allis Chalmers, 471 U.S. at 212. The tort of interference with a contractual and employment

relationship clearly exists as a matter of state-law and is a non-negotiable right. Id. at 213. Dougherty's claim should not have been preempted.

C. Resolution Of Dougherty's State Tort Claim Does Not Require Interpretation Of The Labor Agreement And Poses No Threat To The Goal Of Uniform Interpretation.

The primary goal of federal preemption under §301 is the uniform interpretation of labor agreements. Allis-Chalmers, 471 U.S. at 211-212. The Sixth Circuit did not address this issue, and did not explain how permitting Dougherty's claim would frustrate that goal. (See Appendix A, at 36-37 The district court stated that its decision to preempt Dougherty's claim was based on the fact that recognition of the claim would "jeopardize" interpretive uniformity since the labor agreement could be interpreted by a state court, and because Dougherty's remedies for breach of the agreement would be expanded beyond those available under §301. (See Appendix B at 68). There is no

justification or authority for this erroneous and overly broad application of the preemption doctrine.

Resolution of Dougherty's tort claim against Seaboard is simply a matter of examining Seaboard's conduct and determining its motive. See Juhasz and Heheman, supra. Dougherty claims that he was terminated by Parsec at Seaboard's instruction. Seaboard's motive was to retaliate against Dougherty for making complaints to the Occupational Health and Safety Administration, for exercising his right of free speech, and for challenging Seaboard's unwarranted interference with the relationship between Parsec and the Union. (Complaint ¶ 11). Once Dougherty proves that he was terminated at Seaboard's request for the alleged reasons the inquiry ends. There is no need for a court or jury to undertake the superfluous task of determining if there was a breach of the labor agreement.[4] Whether the reason for

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[4] To determine the issue of just cause, the trier of fact examines the following: (1) whether the employee had notice of possible consequences; (2) whether a rule or order was reasonable; (3)

Dougherty's termination constitutes just cause under the contract is plainly irrelevant to his claim against Seaboard.

Additional arguments support Dougherty's position that the labor agreement, and more particularly, the just cause article, need not be interpreted.

First, the law of Ohio protects the employment relationship from outside interference even absent a contract. Smith v. Klein, supra. Dougherty does not forfeit this basic protection by virtue of the contract between the Union and Parsec. As this Court noted in Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985):

> "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have joined unions by preventing them from benefiting from state

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whether there was an investigation of the alleged infraction; (4) a fair and objective investigation; (5) substantial proof of guilt; (6) equal treatment and (7) a penalty reasonably related to proven quilt and the term of employment. Koven and Smith, Just Cause: The Seven Tests, BNA (1985).

> labor regulations imposing minimal standards on non-union employers."

Id. at 756. Since all employees in Ohio are protected from outsiders even when no contract is present, a breach of contract is not a prerequisite to an interference claim. Whether a contract exists or not, the focus remains on the conduct and motives of the interferring party.

Second, contrary to Seaboard's argument below, there is no requirement that Dougherty prove a breach of the labor agreement by Parsec to prevail on his interference claim against Seaboard. Many courts have so held. For example, in Goodall v. Columbia Ventures Inc., 374 F. Supp 1324 (SDNY 1974), the court held:

> "It is not necessary, as plaintiff erroneously argues, to allege a breach of contract to state a valid claim for interference with contractual relations. The tort extends to cases in which performance of the contract is rendered more difficult or a party's enjoyment of the contract's benefits is lessened by the wrongdoer's actions.".

Id. at 1332. See also American Fletcher Mortgage Co., Inc. v. U.S. Steel Credit Corp., 635 F.2d 1247 (7th Cir 1980) where the court held that a claim for tortious interference with contract would be recognized without an actual breach of the contract.

Third, the labor agreement and bargaining relationship between Parsec and the Union will not be affected by Dougherty's claim against Seaboard. Dougherty, as an individual, is suing Seaboard, a nonsignatory, for interferring with his employment relationship with Parsec. Even assuming that a state court may refer to the labor agreement, the findings of that court will not bind Parsec and the Union. They are not parties to the tort action. They are defendants in Dougherty's companion hybrid §301-DFR action, and their rights and obligations will be determined in that case according to the contract and federal law. As the Seventh Circuit noted in Loss v. Blankenship, 673 F.2d 942 (7th Cir 1982):

> The Lucas Flour Court based its decision on the fact that, if collective

> bargaining agreements were construed differently under state and federal law, "neither party could be certain of the rights which it had obtained or conceded." Requiring suits against non-parties for tortious interference with contract to be brought under state law, however, will not "exert a disruptive influence upon both the negotiation and administration of collective agreements. Parties to the collective bargaining agreement will still be able to have their respective obligations to one another determined by federal law."

Id. at 748. n.6. (emphasis ours).

Finally, Dougherty's remedies for breach of the labor agreement will not be expanded "beyond those available under §301, e.g. backpay, and reinstatement to include the potential for punitive damages and attorney fees." (Appendix B at 70) Parsec and the Union will not be liable for any more than their portion of Dougherty's backpay. Bowen, supra. If Dougherty recovers any tort

damages against Seaboard, it will be because Seaboard interfered with his employment, not because Parsec breached the contract.

D. Dougherty's State Law Claim Is Consistent With The Federal Scheme And Protects The Interests Of Contracting Parties

Under the preemption doctrine, courts will sustain a local regulation "unless it conflicts with federal law or would frustrate the federal scheme." Allis-Chalmers, 471 U.S. at 209, citing Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). As noted in Mitchell v. Pepsi Cola Bottlers, Inc., 772 F.2d 342 (7th Cir. 1985), this Court has permitted state-law claims to proceed when those claims

> " . . . threatened no interference with the operation of federal labor law and . . . involve issues unrelated to the central concerns of federal labor statutes."

Id. at 346.

In this case, there is no conflict with the federal law or labor policy. As noted, a state law claim has been asserted against a party that has no collective bargaining interest. In addition, the law of Ohio supplements the federal law and protects the parties to a labor agreement from unwarranted third-party interference.

E. Dougherty's Tort Claim Against Seaboard For Interference Is Not Inextricably Intertwined With The Labor Agreement

This Court has been careful to point out that §301 does not automatically preempt claims merely because a labor agreement lurks in the background. In Allis-Chalmers, supra this Court held:

> "Of course, not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement is preempted by §301 or other provisions of federal law."

Id. at 211. The Court also provided the following caveat:

> "Nor do we hold that every state-law suit asserting a right that related in some way to a provision a collective bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted by §301."

Id. at 220.

In Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971), the Court held:

> "We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and Union; obviously much of this is left to the States."

Id. at 289.

In Franchise Tax Board v. Construction Laborer's Vacation Trust, 463 U.S. 1 (1983), this Court stated:

> "even under §301 we have never intimated that any action merely relating to a contract within the

> coverage of §301 arises exclusively under that section."

Id. at 25, m.8.

This case presents issues which are peripheral to federal labor law and policy. Dougherty's claim is plainly "tangential" to the labor contract, and the interests of the parties to that agreement.

Certainly, there is a labor agreement tied to Dougherty's claim for interference with contract. However, if that contract has any importance or relevance at all, it is simply that it exists. The terms of the agreement are inconsequential.[5] The contract does not have to be interpreted. Dougherty need not show that the agreement was breached. The mere fact that some contract is needed before there can be a claim for interference

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[5] In Caterpillar v. Williams, supra, the Court stated:

> "Claims bearing no relationship to collective bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by §301. 107 S.Ct. at 2432, n.10.

with contract does not, by this Court's rules, mandate preemption. The critical issue is whether the terms of that agreement will have to be interpreted. They will not. This case is a prime example of a dispute concerning employment which tangentially involves a labor contract. Preemption, under the guise of Allis-Chalmers is therefore inappropriate.

II. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER FEDERAL LAW PROVIDES A REMEDY FOR A TORTIOUS INTERFERENCE CLAIM AGAINST A NON-SIGNATORY

In this case, the decision of the Sixth Circuit led to an extremely harsh result. Dougherty had no remedy under §301 because Seaboard was not a party to the contract, but his state tort claim was preempted by §301. The reason for this result is the Sixth Circuit's view, shared by others,[6] that a claim for interference against a

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[6] Those circuits in line with the Sixth Circuit include the Fifth, Seventh, and Ninth. See Carpenters Local Union v. Pratt-Farnsworth, 690 F.2d 489 (5th Cir. 1982); Carpenters Southern California Administrative Corp. v. Majestic

nonsignatory cannot be brought under §301. Service Employees, supra.

Other circuits have adopted the opposite view. For example, in Wilkes Barre Publishing Co. v. Newspaper Guild, 647 F.2d 372 (3rd Cir 1981),[7] the Third Circuit held that while a state tort action for interference against a third party was preempted by federal labor, the claim could be brought and decided under §301. The rationale for the Wilkes Barre decision was two-fold: First, because a labor agreement would be interpreted to determine if a breach occurred, the interference claim was governed by federal law. Id. at 381. Second, the court recognized that the opposite result from, that reached by the Sixth Circuit in this case, would insulate the interferor from liability:

Housing, 743 F.2d 1341 (9th Cir. 1984) and Loss v. Blankenship, 673 F.2d 942 (7th Cir. 1983).

7 See also International Union, UMWA v. Eastover Mining Co., 623 F.Supp 1141 (DC VA 1985), where the court reached the same conclusion after considering the Allis Chalmers decision.

> "But whereas the district would preempt state law protections of labor contracts while at the same time denying that the federal common law affords any protection, leaving the employer wholly unprotected from tortious interference, we have held that §301(a) grants the federal courts authority to develop such protections."

647 F.2d at 382.

Federal labor law should be uniform. Local 174, Teamsters v. Lucas Flour, 369 U.S. 95 (1962). Yet there is an obvious conflict between the circuits concerning §301. The availability of some remedy, whether state or federal, should not depend upon the circuit in which claim is filed.

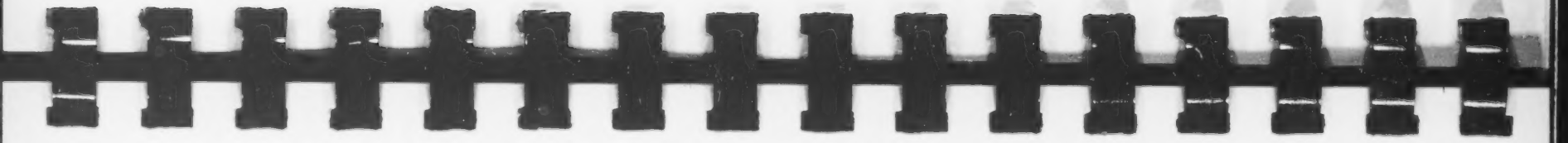
We believe the better view is that suits for tortious interference against nonsignatories are for the state courts to decide. See Loss v. Blankenship, supra. However, if in fact such claims are of grave federal concern and the preservation of federal labor contract law is paramount, then, as in Wilkes Barre, the party

making such a claim should be provided a remedy at federal law. Accordingly, we urge the Court to resolve this conflict.

CONCLUSION

By preempting Dougherty's state tort claim which has no impact on the labor agreement and the parties to that agreement, the Sixth Circuit has overstepped the bounds of preemption under §301 set forth in the Lueck case. No goal of the preemption doctrine is threatened, and there is no justification for totally denying Dougherty a legal remedy, in any forum, against a party which has deprived him of his right to earn a living. The opinion of the Sixth Circuit is contrary the current trend of authority as exemplified in Williams case.

In addition, to prevent this unduly harsh result from occurring in the future, this Court must decide whether claims for interference against non-signatories may be brought under §301. As made



obvious by this case, the current conflict among the circuits is unacceptable and permits non-uniformity in federal labor law.

This case presents novel and significant issues affecting millions of American workers which are ripe for resolution by this Honorable Court.

PRAYER

For the foregoing reasons, Petitioner prays that a writ of certiorari issue directed to the United States Court of Appeals for the Sixth Circuit in this case to the end that the order of that Court, and the Order of the United States District Court for the Southern District of Ohio, Western Division may be reviewed by this Court and reversed.

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AFFIDAVIT OF SERVICE

I hereby certify that two copies of the foregoing document were sent by ordinary U.S. Mail to Harold Freeman, Esq., Dinsmore & Shohl, 2100 Fountain Square Plaza, Cincinnati, Ohio 45202; George Yund, Esq., Frost & Jacobs, 201 East Fifth Street, Cincinnati, Ohio 45202 and Jonas Katz, Esq., Gettler, Katz & Buckley, 6 East Fourth Street, Cincinnati, Ohio 45202 this 30 day of October, 1987.

Paul H. Tobias by

Paul H. Tobias

APPENDIX A

No. 86-3482

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

William Dougherty,
Plaintiff-Appellant,

v.

Parsec, Inc.; Truck Drivers, Chauffeurs & Helpers, Local Union #100; Budco Group, Inc., Seaboard System Railroad,
Defendants-Appellees

On Appeal from the United States District Court for the Southern District of Ohio

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Decided and Filed July 22, 1987

Before: ENGEL and KRUPANSKY, Circuit Judges; and GILMORE, District Judge.

ENGEL, Circuit Judge, delivered the opinion of the court, in which KRUPANSKY, Circuit Judge, joined. GILMORE, District Judge, (pp. 5-15) delivered a separate dissenting opinion.

ENGEL, Circuit Judge, Plaintiff William Dougherty appeals a summary judgment entered against him and in favor of defendant Seaboard

System Railroad, and certified as final under Rule 54(b) of the Federal Rules of Civil Procedure. In certifying the appeal, senior United States District Judge David S. Porter made a thorough statement in support of his finding that there as "no just reason for delay." See Solomon v. Aetna, 782 F.2d 58 (6th Cir. 1986); Compact v. Metropolitan Government of Nashville and Davidson County, 786 F.2d 227 (6th Cir. 1986).

Prior to the underlying litigation, Mr. Dougherty had been employed as a crane operator by the defendant Parsec, Inc. Parsec and the defendant Local 100 of the Teamsters Union were parties to a collective bargaining agreement which was applicable to Dougherty's employment and provided that plaintiff could be terminated only for "just cause." The agreement contained the usual provisions for processing of grievances, including the usual steps requisite to proceeding to a hearing before a joint committee of the Teamsters and members of the trucking industry.



In his complaint, Dougherty asserted that on or about June 27, 1985, Parsec discharged him from his employment at the request of Seaboard. He alleged that Seaboard brought about his discharge because he had complained to OSHA concerning certain unsafe work conditions which Seaboard allowed to exist on its premises. Plaintiff at the time had been required to carry on part of his duties on Seaboard's premises. Parsec denied that it was in any way motivated by an complaint of Seaboard, denied that his discharge was motivated by a retaliation for his "ringing the bell" on Seaboard, and instead asserted that he had been properly discharged for just cause.

A grievance protesting plaintiff's discharge was taken to a hearing before the joint committee, and the committee upheld the discharge. Plaintiff alleges that the committee was biased against him and that the union was negligent in presenting his grievance. The complaint requests relief under section 301 of the Labor Management Relations Act, 29 U.S.C. §185, for breach of the collective



bargaining agreement on the part of the employer, and also for breach by the union of its duty of fair representation. Plaintiff also appended a claim against Seaboard for tortious interference with his contractual relationship with Parsec.

In its motion for dismissal Seaboard argued first that the tortious interference claim was preempted by section 11(c) of the Occupational safety and Health Act, 29 U.S.C. §660(c). This section, which prohibits retaliatory actions against individuals who make complaints to OSHA, does not create a private right of action. Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980). As a backup position, Seaboard also contended that under Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), the tortious interference claims was preempted by section 301 of the Labor Management Relations Act. Judge Porter accepted Seaboard's second argument, and we fully agree. A copy of Judge Porter's memorandum and order of May 9, 1986 is attached hereto as Appendix A.



While acknowledging that the issue was not free from doubt, Judge Porter, concluded that a fair reading of Allis-Chalmers was that a tort claim under state law is preempted by section 301 if that claim is "inextricably intertwined with consideration of the terms of the labor contract." Id. at 213. Judge Porter observed that some of the public policies served by preemption would not necessarily be endangered by permitting plaintiff to proceed on the pendent claim, and Judge Porter also acknowledged that such a cause of action can exist under Ohio law, see Heheman v. E.W. Scripps Co., 661 F.2d 115 (6th Cir. 1981); Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129 (S.D. Ohio 1974). However, Judge Porter also stated: "Regardless of how the tortious interference with a contract claim is defined, the terms of the labor agreement will have to be scrutinized to determine if Seaboard induced its breach." We agree with Judge Porter that his conclusion is reinforced by the cases cited by Seaboard, such as Satterfield v. Western Electric Co., 758 F.2d 1252 (8th Cir.

1985). He concluded that even if plaintiff had filed separate actions in state and federal courts, such a procedure would have an improper impact upon national labor policy and the interest of Congress in the speedy and uniform administration of national labor law under the National Labor Relations Act. Again, we agree. The only contract with which any interference could be charged is the collective bargaining agreement. An interference claim could not exist in the absence of such agreement, which in turn is exclusively to be interpreted under federal law.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

GILMORE, District Judge (Dissenting): I respectfully dissent from the majority opinion. In this case, William Dougherty appeals a summary judgment entered against him in favor of one of the defendants, Seaboard System Railroad. The district judge certified the judgment as final pursuant to Fed. R. Civ. P. 54(b). The issue is whether Dougherty can maintain an action against Seaboard

Railroad System in light of the preemption provisions of Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

I

This is a labor dispute arising out of the firing of William Dougherty by his employer, Parsec. He has charged Parsec with violation of the collective bargaining agreement; his union, the Truck Driver, Chauffeurs and Helpers Local Union No. 100 (Teamsters), with violation of the duty of fair representation, and a third-party customer of Parsec, Seaboard System Railroad (Seaboard), the appellee, with tortious interference with a labor contract. The district court granted Seaboard's motion to dismiss, ruling that Dougherty's tort claim was preempted by federal labor law, and that the claim could not be maintained under federal law because Seaboard was not a signatory to the labor contract between Parsec and the Teamsters.

Parsec performs services for Seaboard by loading and unloading railroad cars. Dougherty, a Teamster, was employed by Parsec as a crane operator. Pursuant to a collective bargaining agreement with Parsec and the Teamsters, Parsec could fire Dougherty only for just cause. Seaboard was not a party to this contract, and was not Dougherty's employer. In April 1985, Dougherty complained to the Occupational Safety and Health Administration (OSHA) about allegedly hazardous working conditions at Seaboard. In June 1985, Parsec fired him.

Dougherty alleges that Seaboard requested he be fired in retaliation "for filing a complaint with OSHA, and for exercising his right of free speech and his right to complain concerning Seaboard's unwarranted interference with Company (Parsec)-Union relations." Complaint, ¶ 11 Joint Appendix p.5[1]. Dougherty claims he was fired by Parsec in violation of the "just cause" clause in

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[1] Section 11(c) of the Occupational Safety and Health Act prohibits retaliatory actions against individuals who complain to OSHA. 29 U.S.C. §660(c).

the contract, and that Seaboard's alleged request that he be fired was a major factor in Parsec's decision.

Seaboard moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on the alternative grounds that (1) private parties cannot enforce OSHA's prohibitation on retaliatory discharges against individuals who complain to OSHA and (2) that the tortious interference with contract claim is preempted by federal labor law. The trial judge ruled in Seaboard's favor on the preemption issue, and did not address whether Dougherty's claims against Seaboard were barred by OSHA. Dougherty appeals the preemption decision. Seaboard argues on appeal that even if the state tort claim is not preempted by labor law it is barred by OSHA.

II

The District Court properly ruled that Dougherty could not bring a tortious interference with contract claim under Section 301 of the Labor Management Relations Act, which provides:

> Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . .

29 U.S.C. §185(a). A district court does not have subject matter jurisdiction under Section 301 over a nonsignatory to a collective agreement where the rights or duties of the nonsignatory party are not stated in the terms and conditions of the contract. Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 v. Commercial Property Services, Inc. 755 F.2d 499, 506 (6th Cir. 1986), cert. denied, __ U.S. __,106 S. Ct. 147 (S.E.E.U.). S.E.E.U. held that a district court

erred in dismissing a pendent state law tortious interference claim against a nonsignatory on the merits, ruling that the claim should have been dismissed without prejudice for want of jurisdiction.[2] Thus, the district court in this case properly held that Dougherty could not maintain his action against Seaboard pursuant to Section 301. However, Dougherty and Seaboard are of diverse citizenship, permitting federal courts to exercise subject matter jurisdiction over these parties. 28 U.S.C. §1332(a).

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[2] There is not full agreement among the circuits on this issue. The Fifth, Seventh, and Ninth Circuits agree that Section 301 provides jurisdiction over non-signatories only in limited circumstances. Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc. 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983); Carpenters Southern California Administrative Corporation v. Majestic Housing, 743 F.2d 1341 (9th Cir. 1984); Loss v. Blankenship, 673 F.2d 942 (7th Cir. 1983). Two circuits have permitted tortious interference with contract claims over non-signatories. Local 472, United Association of Journeymen v. Georgia Power Co., 684 F.2d 721 (11th Cir. 1982); Wilkes-Barre Publishing Co. v. Newspaper Guild, 647 F.2d 372 (3d Cir. 1981), cert. denied, 454 U.S. 143 (1982).



The Supreme Court has held that, where the resolution of a state law claim is substantially dependent on the analysis of the terms of a collective bargaining agreement, the claim must be treated either as a section 301 claim or dismissed as preempted by federal labor law. Allis-Chalmers v. Lueck, 471 U.S. 202 (1985). The central issue in this case is whether a state law claim of tortious interference with a labor contract against a party who has not signed the contract is preempted. I do not think it is.

In Lueck, an employee brought a state tort claim (in state court) against an employer and insurer for the bad faith handling of an insurance disability claim. The disability plan had been collectively bargained for, and the collective bargaining agreement established a three-part procedure to settle disability grievances administered by a joint union-employer committee. The Supreme Court held that the claim was preempted by federal labor law even though the action sounded in tort.

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of §301 by re-labeling their contract as claims for tortious breach of contract.

Lueck, 471 U.S. at 211. The Court continued:

> Our analysis must focus, then, on whether the [state] tort action . . . as applied here confers non-negotiable state law rights on employers or employees independent of any right established by contract, or instead,

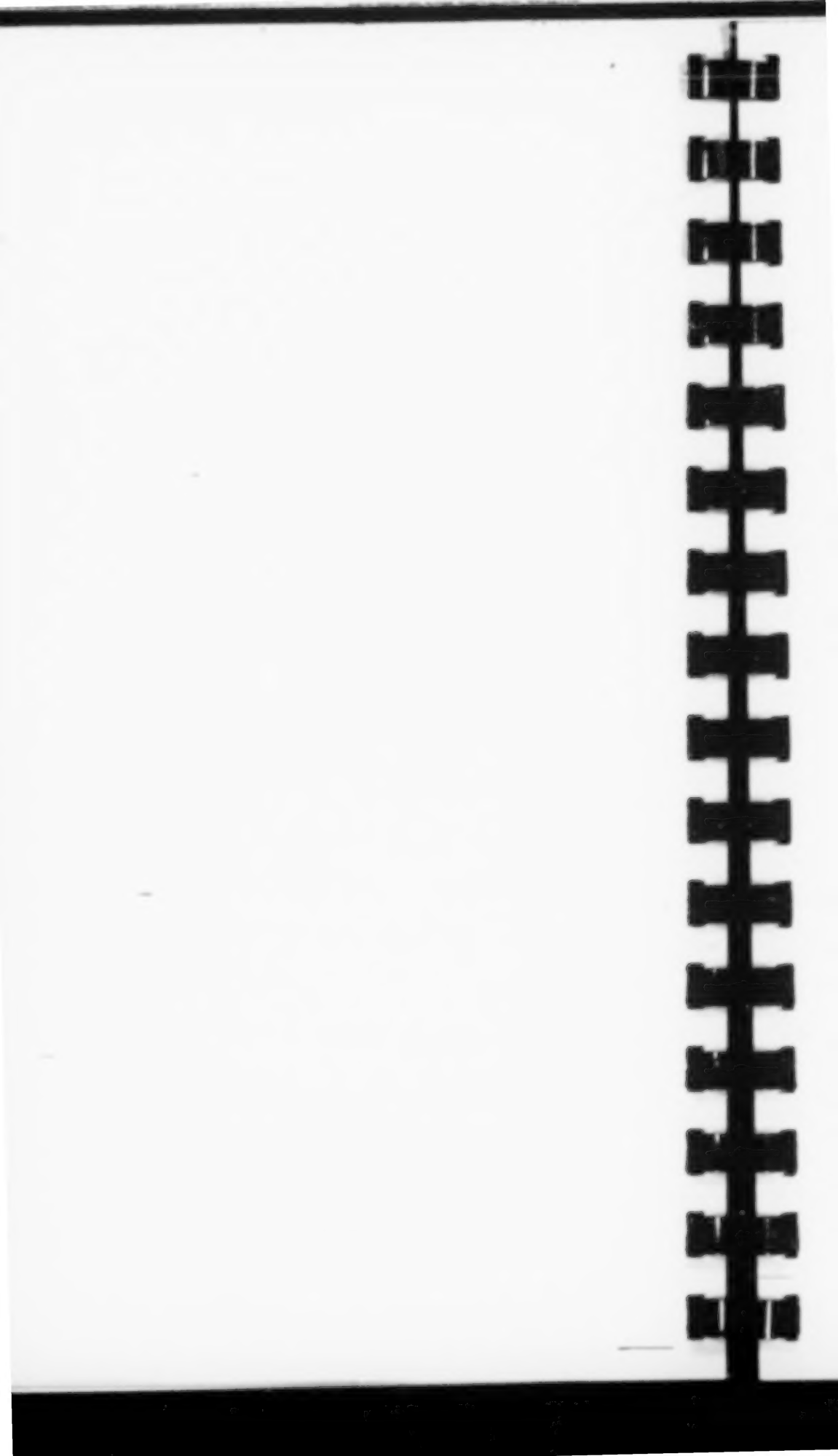
> whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contracts. If the state tort law purports to define the meaning of the contract relationship, that law is preempted.

Id., 471 U.S. at 213. Significantly, the Court stated that:

> No every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is pre-empted by §301 or other provisions of the federal labor law. (emphasis added).

Lueck, 471 U.S. at 211. The Court specifically refused to pass judgment on whether an independent, state-imposed duty that did not create similar problems of contract interpretation would be preempted.

The Lueck Court found preemption on the basis that the tort claim for bad-faith handling of an insurance claim could only be resolved by reference to the obligations that were created by the contract, and hence was preempted by federal law.



The contract itself provided for a committee to resolve any insurance-related disputes. Lueck at 215. Under state law, the parties had the power to agree to what would constitute "reasonable performance of obligations under an insurance contract." Finally, the rights and duties involved in the tort of bad-faith failure to perform the contract derived from obligations established by the contract. Thus, even under state law, the tort claim was firmly rooted in the expectations of the parties who had signed the labor contract, and therefore had to be evaluated by federal labor law.

There were two major policy considerations in the Lueck decision. The first was that allowing contract terms to have different meanings under federal and state law "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Id. at 210. The evils that would flow from the absence of uniform federal contract law include:

> Parties would be uncertain as to what they were binding themselves to when they signed a labor contract.
>
> Contract negotiations would be made immeasurably more difficult by the necessity of trying to formulate contract provisions that allowed for different law.
>
> Disputes over contract interpretation would proliferate.
>
> The same contract term would not have a uniform interpretation, raising the possibility that the same contract might be interpreted differently in different jurisdictions, thus hindering the Congressional policy of establishing a uniform body of federal labor law.

Id. 471 U.S. at 210-11.

The second major policy underlying Lueck is that preemption of derivative tort claims "preserves the central role of arbitration" in labor law. Id., 471 U.S. at 19. The Court said:

> Perhaps the most harmful aspect of the Wisconsin decision [allowing the

> state claim] is that it would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement.

Id. The Court continued:

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, (cite omitted) as well as eviscerate a central tenet of federal labor-contract law under §301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. 471 U.S. at 220.

It may appear at first glance that the district court was correct in asserting preemption here. Seaboard is accused of a tortious interference with a labor contract between Dougherty and Pasec, and under Ohio law Seaboard is liable if, without a privilege to do so, it induced or otherwise improperly caused Parsec not to peform

its contract with Dougherty. Juhasz v. Quick Shops, Inc., 55 Ohio App. 2d 51, 379 N.E. 2d 235, (1977),; Heheman v. E.W. Scripps Co., 661 F.2d 1115, 1127 (6th Cir. 1981). The central element of Dougherty's claim against Seaboard is whether Parsec had just cause to fire Dougherty, and the district court reasoned that, since resolution of the claim was dependent upon an analysis of the just cause provision of the contract, Lueck mandated the conclusion that the tort claim was preempted. This decision was consistent with other cases holding that tortious interference with labor contract claims are preempted by §301. See Hilliard v. Dobelman, 774 F.2d 886 (8th Cir. 1985); Evangelista v. Inlandboatmen's Union, 777 F.2d 886 (8th Cir. 1985); Peterson v. Air Line Pilots Assoc., 759 F.2d 1390 (9th Cir. 1985); Peterson v. Airline Piots Assoc. 759 F.2d 1161 (4th Cir. 1985), cert. denied 106 S.Ct. 312 (1986).

The significant distinction between all of the cases cited above and this case is that in all of those cases the claims were against entities who

had signed the labor contract, or their agents. Those decisions, and the policy behind the Supreme court's holding in Lueck are not applicable where the tortious interference claim is made against a nonsignatory to the labor contract.

It is true that tortious interference claims against nonsignatories have been held to be preempted by the National Labor Relations' Act, 29 U.S.C. § 157, 158, where the conduct for which the plaintiff alleges he was fired was protected by the NLRA. See Satterfield v. Western Electric Company, 758 F.2d 1252 (8th Cir. 1985). There is no allegation here, however, that the plaintiff was engaged in activities protected by the NLRA. Section 301 preemption is based upon the relationship between the claim and the labor conract, while the inquiry in NLRA preemption is whether the plaintiff's conduct is protected by the statute, without reference to the contract.

It was pointed out by the Seventh Circuit in a pre-Lueck case, Loss v. Blankenship, 673 F.2d 912 (7th Cir. 1982), that:

> Requiring suits against non-parties for tortious interference with contract to be brought under state law, however, wiill not "exert a disruptive influence upon both negotiation and administration of collective agreements." (citing cases) Parties to the collective bargaining agreement will still be able to have their respective obligations to one another determined by federal law.

Id. at 948, n.6. The validity of the Seventh Circuit's analysis is not affected by Lueck. Although a court must analyze the contract to determine whether a contract exists, and whether there has been a breach, in order to resolve whether the contract has been tortiously interfered with, this is not the type of case that requires preemption under Lueck. Lueck was concerned with the preemption of state laws that would modify the relationships created by labor contracts. Comment, 86 Col.L.Rev. 1051, 1063-64 (1986). As the Court pointed out in Lueck, at page 213 "If the state tort law purports to define the meaning of the

contract relationship, that law is preempted." Allowing a state law action to proceed against a party who has not signed the labor contract, and whose obligations are not defined by the contract, will neither define nor modify the contractual relationship between the employer and the union.

One of the basic concerns of Lueck was that application of state law to labor contract terms would result in uncertainty in contract negotiations and increase the number of disputes over contract interpretation. None of these concerns is implicated here. Dougherty's allegation that Seaboard interfered with the labor contract will have no impact on either the Union's or Parsec's interpretation of the contract. Whether or not the contract was violated will still be decided in accordance with federal law, and state law will not be applied to the contract itself, but rather only to Seaboard's "extra-contractual" conduct. Accordingly, it will have no impact upon either the negotiation or administration of labor contracts, nor is there any

reason to believe that holding a nonsignatory liable for tortious interference with the contract will increase disputes over contract interpretion.

The other major policy underlying Lueck was the concern that permitting state law claims would allow plaintiffs to avoid the fundamental labor policy that contract disputes should be decided by arbitrators in the first instance. That is not a problem where a tortious interference with contract claim is being made against a nonsignatory. The Sixth Circuit has held that a non-signatory cannot be ordered to arbitrate a labor dispute absent a specific finding that the relationship between it and the party bound by the contract is such that it too is bound to arbitrate. S.E.E.U., 755 F.2d at 504. No such findings have been made in this case.

The only cases holding that tortious interference claims against non-signatories are preempted by federal labor law have allowed the claims to be brought under Section 301. Wilkes-Barre Publishing Co., v. Newspaper Guild, 647 F.2d 372 (3rd Cir. 1981), cert. denied, 454 U.S. 143

(1982); International Union, UMWA v. Eastover Mining Co., 623 F. Supp. 1141 (D.C.Va 1985). Thus, even though the state claims were preempted, the plaintiff was given a Section 301 remedy against the non-signatory. However, this Circuit has held that Section 301 does not provide subject matter jurisdiction over nonsignatories in most instances. Thus, to affirm the district court in this case would be to leave the plaintiff without a remedy: unable to gain relief under Section 301, but prohibited from bringing an action under state law. It would not further the policies of either the Congress, in enacting the federal labor statutes, or the Supreme Court in Lueck, to give a third party who has allegedly interfered with a labor contract what effectively amounts to immunity.[3]

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[3] This issue impacts a broad spectrum of workes. For instance, the construction industry, which is one of the country's largest in terms of employment, is characterized by decentralized work sites where the possibility of "third party interference" is significant. See Stiglitz, "Union Representation in Construction: Who Makes the Choice?" 18 San Diego L. Rev. 583 (1981).

Allowing a union member to sue a non-signatory for tortious interference with a labor contract does not implicate any of the policies favoring the application of federal labor law found in Lueck. The application of state law to Dougherty's claim against Seaboard will not require the state law be used to interpret the collective bargaining agreement, nor will the resolution of this claim modify the contractual relationship between the union and employer. Dougherty's tortious interference with the contract claim against Seaboard is not preempted by Section 301 of the Labor Management Relations Act.

Seaboard argues that, even if the tortious interference with contract claim is not preempted, it should be dismissed as there is no private cause of action to enforce section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. §660(c), that prohibits retaliatory actions against individuals who file complaints with OSHA. It is

true that this provision does not create a private right of action. Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980).

What Seaboard disregards, however, is that retaliation for complaining to OSHA is not the sole basis for Dougherty's claim of tortious interference. His complaint alleges that:

> Seaboard's action in requesting discharge [sic] was motivated buy a desire to retaliate againsnt Plaintiff for filing a complaint with OSHA and for exercising his right of free speech and his right to complain concerning Seaboard's unwarranted interference with Company-Union relationships.

Complaint, ¶11, Joint Appendix p.5. Thus, retaliation for complaining to OSHA was only one of three allegations behind the tortious interference with contract claim. Even if the OSHA allegation is removed, the freedom of speech and unwarranted interference with employer-union relationship

allegations remain. The district court did not rule on these issues, leaving no record for this panel to review.

II

Therefore, it appears to me that the case should be reversed because the claim is not preempted. I therefore respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

APPENDIX A

William Dougherty,

Plaintiff

v.

Parsec, Inc., et al

Defendants

Civil No. C-1-85-1912

MEMORANDUM AND ORDER

PORTER, S.J.:

Decided and Filed May 9, 1986

This case is before the Court on defendant Seaboard's motion to dismiss plaintiff's claim against it. The claim alleges Seaboard tortiously interfered with a labor contract between plaintiff and defendant Parsec. Because we believe that plaintiff's claim is pre-empted under the rule of

Allis-Chalmers v. Lueck, 105 S.Ct. 1904 (1985), we grant Seaboard's motion and dismiss the claim against it.

The pertinent facts are the following. Plaintiff was employed by defendant Parsec as a crew operator. Parsec and defendant Union (Teamsters Local 100) were parties to a collective bargaining agreement. Under the agreement, plaintiff could be terminated only for just cause. Parsec loaded and unloaded containers for Seaboard on Seaboard's premises, but plaintiff was never employed by Seaboard. Seaboard was not a party to the collective bargaining agreement between Parsec and the Union.

Plaintiff alleges that because of complaints he made to the Occupational Safety and Health Administration (OSHA) about hazardous conditions at Seaboard, Seaboard prevailed upon Parsec to terminate plaintiff. Plaintiff alleges that his termination violated the "just cause" provision of the collective bargaining agreement.

Plaintiff filed a grievance protesting the discharge, which was processed to a hearing before a Joint Committee of the Teamsters and members of the trucking industry. Plaintiff alleges the committee was unfairly biased against him.

Essentially, plaintiff's complaint states a claim for relief under Section 301 of the Labor Management Relatios Act, 29 U.S.C. § 1985 [sic], for breach of contract and also states a claim against the union for breach of its duty of fair representation. Plaintiff also states a claim against Seaboard for tortious interference with the contract.

Seaboard's instant motion seeks dismissal of the claim against it on two grounds. First, Seaboard contends that the state law claim is pre-empted by the provisions of the Occupational Safety and Health Act, Section 11(c), 29 U.S.C. §660(c). Section 11(c) prohibits retaliatory actions against individuals who complain to OSHA. The Sixth

Circuit has held that §11(c) does not create a private right of action. Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980).

We need not decide this first issue, because Seaboard's alternative ground for dismissal is well-taken. Seaboard contends that under the rule of Allis-Chalmers v. Lueck, 105 S.Ct. 1904 (1985), Plaintiff's tortious interference claim must be dismissed as preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

Our starting point in determining whether plaintiff's claim against Seaboard is preempted is the Allis-Chalmers case. There, the Court held that the preemptive scope of Section 301 extends beyond contract violations. The Court determined that a tort claim is preempted by Section 301 if the claim is "inextricably intertwined with consideration of the terms of the labor contract." Allis-Chalmers, supra at 1912. Conversely, the Court held that if the tort action "confers non-negotiable state law rights on employers or employees independent of any right established by

contract," the claim is not preempted. In short, the Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a §301 claim, or dismissed as preempted by federal labor-contract law." Id. at 1916 (citation omitted).

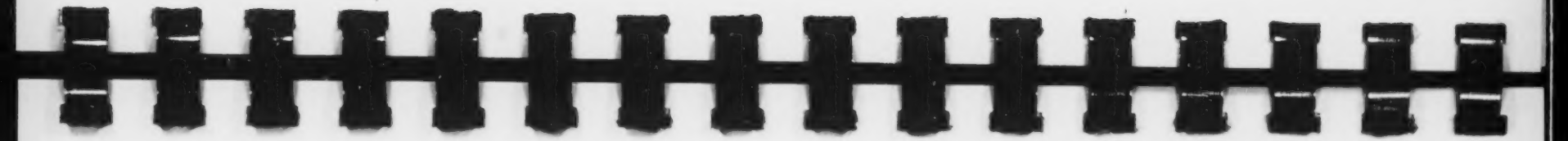
The policies underlying preemption are several, but prominent among them is the Congressional goal of promoting uniformity in the interpretation of labor agreements. Id. at 1911. A secondary goal is the preservation of arbitration as an essential compenent of industrial self-government. Id. at 1915, quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 577, 581 (1960).

Although the Supreme Court has appeared to resolve the substantial question of when a tort claim may be preempted by §301, it left for a case by case analysis the delineation of the reach of

the doctrine. The instant motion raises the unanswered question of how broadly the preemption doctrine should extend.

The exact issue presented here is whether a tortious interference claim against a third party is so intertwined with the terms of the collective bargaining agreement tht it is preempted by Section 301, or whether such a claim seeks to enforce rights sufficiently independent of the labor contract to warrant its treatment as a separate state-law claim.

We are mindful that the opposing positions presented to us are, in the final analysis, very closely balanced. Out task in weighing the issues have been facilitated by the excellent memoranda we have received. Plaintiff contends that the policies protected in Allis-Chalmers would not be jeopardized by our recognition of a state-law claim for tortious interference with a contract. According to plaintiff, resolution of the claim need not involve state-law analysis of the substantive terms of the collective bargaining



agrement since the tortious interference claim exists wholly separate from the contract, and is a creature of state law. Moreover, the claim gives rise only to state-law remedies.

Recognition of the claims, plaintiff thus argues, would not undermine the congressional policy of uniformity in the interpretation of labor contracts. Nor would it diminish the important goal of preserving the central role of arbitration in "our system of industrial self govenment." Allis-Chalmers at 1915.

Defendants counter that the tortious interference claim does require analysis of the substantive terms of the collective bargaining agreement. For authority, defendant refers the Court to Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129 (S.D. Ohio 1974), where we outlined the following essential elements to recovery for tortious interference with contract.

> (1) the contract; (2) the wrongoer's [sic] knowledge thereof; (3) his intentional procurement of

> its breach; (4) the absence of justification, and (5) damages thereof.[1]

Id. at 145, quoting 45 Am.Jur.2d Interference §3. Moreover, defendant cites the Court to several cases that have held tortious interference claims are preempted by §301. See Hilliard v. Dobelman, 774 F.2d 886 (8th Cir. 1985); Evangelistic v. Inlandboatmen's Union, 777 F.2d 1390 (9th Cir. 1985); Mitchell v. Pepsi Cola Bottlers, Inc., 772 F.2d 342 (7th cir. 1985); Peterson v. Airline Pilots Association, 759 F.2d 1161 (4th Cir. 1985), cert. denied, 106 S.Ct. 312 (1985).

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[1] Plaintiff's version of the requisite elements in a tortious interference claim are

(1) the nature of the actor's conduct

(2) the nature of the expectancy with which his conduct interfers,

(c) the relations between the parties,

(d) the interest sought to be advanced by the actor and

(e) the social interest in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

Hehman [sic] v. E.W. Scripps Co., 661 F.2d 1115 (6th Cir. 1981), citing Juhasz v. Quick Shops, Inc., 55 Ohio App.2d 51, 379 N.W.2d 235, 238 (1977), citing Restatement of Torts §766 (1939).

We agree with the plaintiff on two points. First, we agree that state-law analysis of the labor contract is not required to analyze the tortious interference claim. The breach of the "just cause" provision can be analyzed for the purpose of a tortious interference claim according to the precepts of §301. Likewise, we agree that promotion of arbitration is not a goal that is implicated in this case. Not only has plaintiff processed the wrongful discharge claim to arbitration, but because Seaboard is not a party to a collective bargaining agreement with plaintiff, plaintiff's state-law claim could not be arbitrated under the labor contract anyway.

Nevertheless [sic], we think the better view of preemption is the one put forward by the defendant. Our reading of Allis-Chalmers persuades us that the Supreme Court has not proceeded cautiously in the area of preemption, as plaintiff asserts, but has rather endorsed a sweeping approach in preemption questions. Indeed, the Sixth Circuit has taken a similar view of the reach

of the preemption doctrine and has held preempted by §30 a state-law claim pressed by a non-party to a labor agreement. In Michigan Mutual [sic] Insurance Co. v. United Steelworkers, 774 F.2d 104(6th Cir. 1985), a worker's compensation insurer brought suit against a union for breach of a duty arising under the collective bargaining agreement. The Court held that the "determination of the existence and scope of the duty which the defendant allegedly breached is "substantially dependent" upon analysis of the terms of a collective bargaining agreement," Id. at 106, quoting Allis-Chalmers, 105 S.Ct. at 1516, and was therefore preempted.

We believe the same result is required here. Regardless of how the tortious interference with a contract claim is defined, the terms of the labor agreement will have to be scrutinized to determine if Seaboard induced its breach. We do not find it significant for our purposes that the contract may be interpreted exclusively by federal law. Common sense tells us that any claim for tortious



interference with a contract is substantially dependent upon analysis of the contract itself. Our conclusion, while not compelled, is at least reenforced by the cases cited by defendant holding that tortious interference claims are preempted by §301.

We are mindful of plaintiff's point that defendant's cases involve suits against either supervisors, see, e.g., Hilliard, supra, Mitchell, supra, or union leaders, see, e.g., Evangelistic, supra; Peterson, supra, and therefore do not apply with full force in the instant case where the defendant is not a party to the collective bargaining agreement. Nonetheless, we find the cases to be persuasive of the point that plaintiff's state-law tortious interference claim is preempted by §301, especially in view of the fact that any claim would require analysis of the collective bargaining agreement anyway.

Our holding is based on the conclusion that recognition of the plaintiff's state-law claim would jeopardize the dominant policy goal behind

preemption, i.e., the uniform federal interpretation of labor contracts. Since the state tort clearly implicates the collective bargaining agreement,[2] recognition of the tort would permit interpretation of the labor contract in a "different environment." Allis-Chalmers at 1915. It will not be in all cases that plaintiffs will, for strategic reasons, join both the federal and state-law claims, as is the case here. Plaintiffs may often find it expedient to bring the tortious interference suit in state court. Thus, the anomalous situation could arise that two cases involving the same collective bargaining agreement could proceed in simultaneous proceedings in state

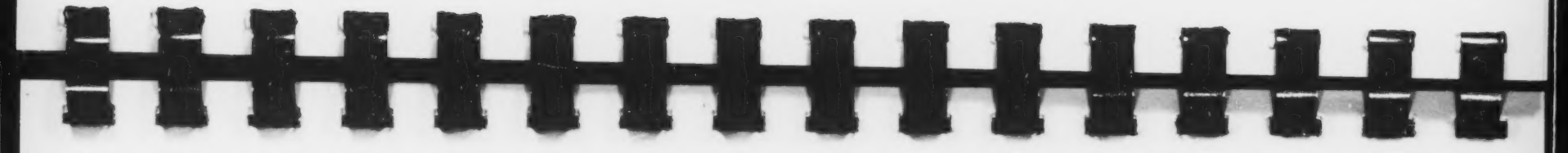
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[2] See also Satterfield v. Western Electric Co., 758 F.2d 1252 (8th Cir. 1985) in which the court, on facts similar to the instant case, held preempted by Section 8(a)(1) of the National Labor Relations Act a tortious interference lawsuit brought by a former employee against a nonparty to the collective bargaining contrat. There, the plaintiff had alleged that he was terminated at the direction of defendant for distributing right-to-work literature to the union members working on defendant's construction site.

and federal courts. We believe that is the exact circumstance the Court in Allis-Chalmers sought to avoid.

Moreover, uniformity is also threatened by recognition of the state tort in terms of the changed legal consequences that would flow from the breach of a collective bargaining agreement. See Allis-Chalmers, supra at 1911. Plaintiff's remedy for breach of the labor contract would expand beyond those available under Section 301, e.g., backpay and reinstatement, to include the potential for punitive damages and attorney fees. Such damages might not alter the respective rights of the contracting parties, but their availability clearly makes the consequences flowing from the breach of the contract partially dependent upon state law.

Plaintiff argues that his case falls outside the scope of the Allis-Chalmers rule in that it involves a right created independent of the collective bargaining agreement, but merely related to it in some way. See Allis-Chalmers, supra at



1516; Michigan Mutual Insurance, supra at 106. We disagree. The tort of interference with a contract is derived from the contract. An interference claim could not exist in the absence of a breach [sic] collective bargaining agreement. See supra. It is thus more than related to the agreement. It is dependent for its very existence on the contract itself.

We recognize that our holding insulates Seaboard from suit by the Plaintiff. However, as defendant correctly points out, the Sixth Circuit has found preemption of a state cause of action appropriate even thought it results in freeing a party from suit. See Michigan Mutual Insurance, supra.

Having determined that the rule of Allis-Chalmers governs the instant motion, we must determine whether to treat the tortious interference claim as a §301 claim, or dismiss it as preempted by federal labor-contract law. Allis-Chalmers, supra at 1916.

The Sixth Circuit Court of Appeals has held that under §301 "a district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory party are stated in the terms and conditions of the contract." Service Employees Union v. Commercial Property, 755 F.2d 499 (6th Cir. 1985). Therefore, even if we treat plaintiff's claim as a §301 claim it must be dismissed.

ORDER

Accordingly, for all of the foregoing reasons, plaintiff's claim against Seaboard is hereby dismissed.

Also, pursuant to Federal Rules of Civil Procedure, Rule 54, we find that there is no just reason to delay the entrance of final judgment on

the instant motion. We therefore direct the Clerk to enter final judgment of dismissal as to plaintiff's claim against Seaboard.

SO ORDERED.

/s/ David S. Porter
United States Senior District Judge

Supreme Court, U.S.
FILED
NOV 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-723

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM DOUGHERTY,

Petitioner,

vs.

PARSEC, INC., TRUCK DRIVER, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 100 AND THE SEABOARD SYSTEM RAILROAD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT THE SEABOARD SYSTEM RAILROAD IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether section 301 of the Labor Manangement Relations Act preempts the claim of an employee, covered by a collective bargaining agreement, alleging tortious interference with his right to be discharged only for just cause.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-_____

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Petitioner,

vs.

PARSEC, INC.,-TRUCK DRIVER, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 100 AND THE SEABOARD SYSTEM RAILROAD,

Respondents.

BRIEF FOR RESPONDENT THE SEABOARD SYSTEM RAILROAD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 34-59) is reported at 824 F.2d 1477. The opinion of the district court is set forth in Petitioner's Appendix B 60-75.

JURISDICTION

The judgment of the court of appeals (Pet. App. A 34-59) was entered on July 22, 1987. The petition for a writ of certiorari was filed on October 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 29 U.S.C. § 185(a), pertinent provisions of which are set forth in Appendix A.

DISCLOSURE OF CORPORATE AFFILIATIONS

The Seaboard System Railroad is a wholly owned subsidiary of CSX Corporation.

COUNTERSTATEMENT OF THE CASE

Petitioner William Dougherty ("Petitioner") was employed by Defendant Parsec, Inc. ("Parsec") as a crane operator. He was represented by the defendant Union, which had a collective bargaining agreement with Parsec. Parsec loaded and unloaded containers for The Seaboard System Railroad ("Seaboard") on Seaboard's premises, an operation in which Petitioner was involved. Petitioner was not employed by Seaboard nor was Seaboard a party to the labor agreement between Parsec and the Union.

Petitioner claimed that because he allegedly complained to OSHA about conditions at Seaboard's facility, Seaboard requested that Parsec discharge him. Parsec allegedly complied with Seaboard's wishes and terminated Petitioner, in violation of the provision in the collective bargaining agreement that provides that discharges shall be for just cause. Appellant filed a grievance under the collective bargaining agreement; the grievance culminated in arbitration as provided by the contract. Following exhaustion of the contractual grievance and arbitration procedure during which the Union represented Appellant, his discharge was upheld.

Petitioner filed a complaint in federal district court asserting that Parsec, his employer, breached its contract with the Union by discharging him without just cause and that the Union breached its duty to fairly represent him in the grievance and arbitration proceedings, conduct proscribed by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In addition, Petitioner sued Seaboard for unlawfully interfering with his contractual employment rights with Parsec because "Seaboard's request that Appellant be discharged was a major and a determining factor causing

Defendant Parsec to terminate Plaintiff" in direct violation of the collective bargaining agreement's just cause provision.

Seaboard filed a motion to dismiss on the basis that the claim against it was pre-empted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The district court agreed, holding "[c]ommon sense tells us that any claim for tortious interference *with a contract* is substantially dependent upon analysis of the contract itself."

On appeal, the Sixth Circuit affirmed. The appellate court held that under this Court's teachings in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), Petitioner's claim of tortious interference with contract was pre-empted. The Sixth Circuit agreed with the district court's rationale holding that "[r]egardless of how the tortious interference with a contract claim is defined, the terms of the labor agreement will have to be scrutinized to determine if Seaboard induced its breach."

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW, IN ACCORD WITH THE DECISIONS OF OTHER COURTS, CORRECTLY APPLIED THE PRINCIPLES SET FORTH BY THIS COURT IN *ALLIS-CHALMERS*.

The Sixth Circuit Court of Appeals simply and narrowly held that Petitioner's claim of tortious interference with contract is pre-empted by section 301 of the Labor Management Relations Act because it is "inextricably intertwined with considerations of the terms of the labor contract." *Dougherty* v. *Parsec, Inc.*, 824 F.2d 1477, 1478 (6th Cir. 1987). The court correctly recognized that the contract with which Seaboard is alleged to have interfered is the collective bargaining agreement and that agreement "is exclusively to be interpreted under federal law." This decision appropriately applies the principles set forth by this Court in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), and is in accord with the decisions of other courts that have addressed the issue.

a. The Sixth Circuit Properly Applied *Allis-Chalmers*.

In *Allis-Chalmers*, this Court engaged in an extensive analysis and set forth the applicable principles for determining when a state tort claim is pre-empted by section 301 of the Labor Management Relations Act. In pre-empting the claim at issue therein, this Court held that if the "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract" it is pre-empted. *Id.* at 213.

The Sixth Circuit properly applied this principle here. There simply can be no resolution of the state law claim absent an analysis and interpretation of the collective bargaining agreement. This is because under Ohio law a critical element of the state claim is the intentional procurement of a breach of the contract at issue. *See Cincinnati Bengals, Inc.*

v. *Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974) (applying Ohio law); *see also Heheman* v. *E.W. Scripps Co.*, 661 F.2d 1115, 1126-27 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); *Juhasz* v. *Quick Shops, Inc.*, 55 Ohio App. 2d 51, 57, 379 N.E.2d 235 (1977).

As the Sixth Circuit correctly held, the collective bargaining agreement is the contract that governs under what circumstances Petitioner may be discharged and is the contract Petitioner, through his complaint, claims was violated. Thus, any resolution of the state claim necessarily requires an interpretation of the collective bargaining agreement to determine whether Seaboard had intentionally procured a breach of that agreement. As the district court held "[c]ommon sense tells us that any claim for tortious interference *with a contract* is substantially dependant upon analysis of the contract itself." Pet. App. B 67-68. Accordingly, an evaluation of the tort claim is "inextricably intertwined" with and entirely dependent upon the breach of the labor agreement between Parsec and the Union. As such, it is pre-empted by section 301.

As stated by this Court, rights that are negotiable or that can be altered by the parties by agreement are pre-empted by section 301. *Allis-Chalmers*, 471 U.S. at 213. The right Petitioner asserts herein is the right not to be discharged without just cause. The very existence of the just cause provision in the labor contract and the fact that it was negotiated into the agreement conclusively disproves Petitioner's assertion that the right is "a non-negotiable right."

Furthermore, under Ohio law, in the absence of some agreement to the contrary, an employee who is hired for an indefinite period is terminable at-will. *Phung* v. *Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986); *Henkel* v. *Education Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976). The just cause provision of the collective bargaining agreement undeniably *alters* that at-will relationship and provides him with a *negotiated* right protecting him from discharge. Thus, Petitioner's rights and

protections concerning grounds for discharge are negotiable and alterable rights that bring his claim within the pre-emptive scope of section 301.

For the first time, Petitioner now claims it is the right to be free from interference from outsiders that he seeks to protect and claims this right arises out of Ohio law, not the labor agreement. What Petitioner fails to recognize is that to the extent such a right exists it was negotiated into and encompassed by the just cause provision of the collective bargaining agreement, which governed the basis upon which Petitioner could be discharged. Accordingly, the right is subject to negotiation and alteration through the collective bargaining process and is pre-empted by section 301.

Allowing Petitioner's tortious interference with contract claim to proceed outside the scope of section 301 runs afoul of the goal of providing uniform federal interpretation of collective bargaining agreements. *See Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 647 F.2d 372, 380-381 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). For example, if Petitioner were permitted to proceed with separate actions in state and federal court, the state court, under Ohio law, would be conferred with the responsibility of interpreting the contract's just cause provision to determine if it had been breached. This is so because, as previously noted, under Ohio law one element of the tort is the intentional procurement of a breach of the contract. *See Cincinnati Bengals, Inc.* v. *Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974) (applying Ohio law); *Heheman* v. *E.W. Scripps Co.*, 661 F.2d 1115, 1126-27 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982). This arrangement potentially could lead to directly contradictory interpretations and decisions between the federal and state courts on the issue of whether the labor agreement had been breached. In addition, it could substantially broaden the remedies available for breach to include attorney's fees and punitive damages. Such a result "would jeopardize the dominant policy goal behind preemption, i.e., the uniform federal interpretation of labor contracts" and simply is not permissi-

ble under *Allis-Chalmers*. *Cf. Allis-Chalmers*, 471 U.S. at 211. The application of the *Allis-Chalmers* principles by the Sixth Circuit were correct and do not warrant a review by this Court.

b. The Sixth Circuit's Decision Is In Accord With The Decisions Of Other Courts That Have Decided The Issue.

Other federal courts consistently have held that state tortious interference suits are pre-empted by section 301.[1] *Lingle* v. *Norge Division of Magic Chef*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 56 USLW 3268 (1987) (when employee covered by collective bargaining agreement claims interference with employment contract, claim stems directly from the labor agreement and is pre-empted); *Scott* v. *Machinists Lodge 190*, 827 F.2d 589, 591-92 (9th Cir. 1987) ("Interference with contract relations is obviously connected with interpretation of the contract."); *Hillard* v. *Dobelman*, 774 F.2d 886, 887 (8th Cir. 1985) ("evaluation of the state tort claim depends upon interpretation of the collective-bargaining agreement"); *Evangelists* v. *Inlandboatmen's Union*, 777 F.2d 1390, 1400 (9th Cir. 1985) (resolution of claim turns upon interpretation of labor agreement); *Mitchell* v. *Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) (tortious termination claim pre-empted by just cause provision); *Peterson* v. *Air Line Pilots Association*, 759 F.2d 1161, 1170 (4th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) (if plaintiff recovers on state interference claim it will be because he establishes federal law violation); *Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 647 F.2d 372, 380-81 (3rd Cir. 1981), *cert. denied*, 454 U.S.

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[1] This Court has, analogously, struck down, as pre-empted by the National Labor Relations Act, claims of tortious interference with employment contracts. *Operating Engineers Local 926* v. *Jones*, 460 U.S. 669 (1983); *accord Iron Workers* v. *Perko*, 373 U.S. 701 (1963); *Satterfield* v. *Western Electric Co.*, 758 F.2d 1252 (8th Cir. 1985).

1143 (1982) (tortious interference claim against non-signatory to collective bargaining agreement pre-empted). This litany of decisional authority reinforces the propriety of the Sixth Circuit's decision herein and counsels against the issuance of the writ by this Court.

In summary, an application of the principles enunciated by this Court's decision in *Allis-Chalmers* mandated that Petitioner's claim of tortious interference with contract be pre-empted by section 301. The Sixth Circuit correctly so held. In addition, when presented with the issue, numerous other courts have reached the same decision. Accordingly, the decision below was proper and does not warrant further review by this Court.

II. THE ISSUE OF WHETHER SECTION 301 PROVIDES FOR A REMEDY AGAINST A NON-SIGNATORY WAS NOT PRESENTED TO THE COURT BELOW AND IS NOT PROPERLY BEFORE THIS COURT.

Petitioner argues that this Court should issue the writ to resolve an alleged conflict in the Circuits concerning whether section 301 provides a remedy for a non-signatory to a collective bargaining agreement. Petitioner, however, never raised this issue before either the district court or the Sixth Circuit Court of Appeals. In those lower proceedings, he simply cited the Sixth Circuit's opinion in *Service, Hospital, Nursing Home & Public Employees Union* v. *Commercial Property Services, Inc.*, 755 F.2d 499 (6th Cir. 1985), *cert. denied*, 474 U.S. 850 (1985) as authority for the proposition that no cause of action existed against Seaboard as a non-signatory. At no time did he request that the Sixth Circuit examine or reconsider that decision. Accordingly, it was not raised as an issue, addressed or decided by the appellate court.

As this Court has repeatedly stated: "Where issues are neither raised before nor considered by the Court of Appeals,

this court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *accord Brandon* v. *Holt*, 469 U.S. 464, 473 n.25 (1985); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958); *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1957); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Only under exceptional circumstances will this Court review an issue not presented in the court below. *Lawn*, 355 U.S. at 362-363 n.16. In the instant case, no exceptional circumstances exist, and accordingly, the issue is not properly presented for this Court's review.

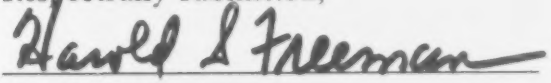
In addition, the thrust of Petitioner's argument is that the Sixth Circuit's decison was "extremely harsh" because it left him with no remedy against Seaboard. This result, however, is no different than the one created by this Court's decision in *Allis-Chalmers*. In that case, plaintiff's tort claim for bad faith handling of his insurance claim against both his employer and an insurance company was held preempted by section 301. Thus, plaintiff was left with a potential section 301 claim against his employer and no remedy against the non-signatory insurance company. In this case, the Sixth Circuit's proper application of *Allis-Chalmers*, which created the identical result, merits no review by this Court.

Furthermore, even as presented by the Petitioner, the Courts of Appeals reflect relative uniformity of opinion with the one aberration being the Third Circuit. *Compare Service Employees*, *supra; Loss* v. *Blankenship*, 673 F.2d 942 (7th Cir. 1983); *Carpenters Local Union* v. *Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) *with Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 647 F.2d 372 (3rd Cir. 1982), *cert. denied*, 454 U.S. 1143 (1982). Respondent submits that one court's aberrant decision rendered eight years ago does not create a split in the circuits sufficient to merit this Court's review.

CONCLUSION

For the reasons set forth above, Respondent, The Seaboard System Railroad, respectfully submits that the writ be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Respondent, The Seaboard System Railroad, in Opposition was sent by regular United States mail, first class, postage prepaid, this 17th day of November, 1987, upon:

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APPENDIX A

29 U.S.C. § 185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

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No. 87-723

IN THE

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OCTOBER TERM, 1987

WILLIAM DOUGHERTY,

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-723

WILLIAM DOUGHERTY,

Petitioner,

v.

PARSEC, INC., TRUCK DRIVERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 100 AND THE SEABOARD SYSTEM RAILROAD,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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BRIEF FOR RESPONDENT PARSEC, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 34-59) is reported at 824 F.2d 1477. The opinion of the district court is set forth in Petitioner's Appendix B 60-75.

JURISDICTION

The judgment of the court of appeals (Pet. App. A 34-59) was entered July 22, 1987. The corrected petition for a writ of certiorari was filed on October 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 29 U.S.C. § 185(a), pertinent provisions of which are set forth in Appendix A.

DISCLOSURE OF CORPORATE AFFILIATIONS

Respondent Parsec, Inc. ("Parsec") is a wholly owned subsidiary of Budco Group, Inc., a closely held corporation.

COUNTERSTATEMENT OF THE CASE

Parsec adopts the Counterstatement of the Case set forth by Respondent The Seaboard System Railroad ("Seaboard") in its Brief In Opposition, at pages 2 and 3.

REASON FOR DENYING THE WRIT

I. PETITIONER'S CLAIM PROPERLY WAS HELD TO BE PREEMPTED BY § 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. § 185(a), PURSUANT TO THIS COURT'S DECISION IN *ALLIS-CHALMERS*.

Petitioner's claim, however cloaked, is nothing more than a claim that he was wrongfully discharged in violation of the terms of a collective bargaining agreement. The resolution of this claim necessarily involves the collective bargaining agreement and federal labor policy, and therefore is properly preempted under *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985). Furthermore, the alleged wrong for which Petitioner seeks redress can be remedied by means that will not subvert the Congressional policy favoring arbitral resolution of industrial disputes.

A. Petitioner's Tortious Interference Claim Significantly Affects The Labor Agreement.

As Petitioner's former employer, Parsec disputes Petitioner's claim that his state tort claim "will have no effect upon the labor agreement and the parties to that agreement." Pet. 8. The Sixth Circuit Court of Appeals correctly recognized that Petitioner's tortious interference claim was "inextricably intertwined" with the collective agreement when it held below that:

> The only contract with which any interference could be charged is the collective bargaining agreement.

Dougherty v. *Parsec, Inc.*, 824 F.2d 1477, 1478-79 (6th Cir. 1987).

Beyond this obvious relationship, were Petitioner permitted to pursue such a claim against his employer's customer, Seaboard, it would significantly affect the contractual relationship involved, a relationship now balanced and carefully

governed by well-established federal law. Part of the "benefit of the bargain" for an employer such as Parsec in its collective bargaining agreement is that its employees are restricted in their remedies, should Parsec breach the agreement, to those provided by the negotiated grievance procedure. In this manner, Parsec's business cannot be injured by employee suits against its customers for incidents covered by the collective bargaining agreement between Parsec and Local 100. Important to Parsec's agreement to be bound by an arbitrator's decision is the insulation from lawsuits that the arbitral process provides Parsec's customers with respect to *all* matters arising out of the collective agreement. Arbitration would cease to play a cental role in this country's "system of industrial self-government," *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960), if it assumed a role collateral or possibly subsidiary to state court tort actions against customers, potential customers, supervisors, co-workers, *etc.* Such actions would become the rule rather than a narrow exception, because of the remedies associated with such tort actions.

Parsec employed Petitioner and Parsec discharged Petitioner. Whether Seaboard influenced that decision, and whether any such influence was wrongful, are not questions that Petitioner is entitled to have answered under state law. Those questions are merely restatements of *the* question that Petitioner *was* entitled to have, and did have, answered by the grievance process, *viz.*, whether he was discharged for just cause pursuant to the terms of the collective bargaining agreement.

The plaintiff in *Hillard* v. *Dobelman*, 774 F.2d 886 (8th Cir. 1985) (per curiam), attempted a similar circumvention of federal labor law by claiming that his supervisors tortiously procured his discharge. As the Eighth Circuit recognized:

> [I]n reality, Hillard was suing [her employer] for her discharge in violation of the collective-bargaining agreement. Because the plaintiff's asserted right and defendants' alleged duty (not to interfere with Hillard's

> employment contract) arise from the collective-bargaining agreement, evaluation of the state tort claim depends upon interpretation of the collective-bargaining agreement (specifically, the just-cause provision). As such, the state claim is pre-empted by federal labor law.

Id. at 887. So too, in *Scott* v. *Machinists Lodge 190*, 827 F.2d 589, 592 (9th Cir. 1987), the court held that a claim for interference with contractual relations was preempted by § 301 because it is "obviously connected with interpretation of the cntract." In *Satterfield* v. *Western Electric Co.*, 758 F.2d 1252 (8th Cir. 1985), a former employer's tortious interference claim against his former employer's customer was preempted under the National Labor Relations Act. Analogously, in this case, Petitioner's real claim is that he was discharged without just cause by Parsec in violation of the collective agreement.

No matter how Petitioner attempts to characterize his discharge, its propriety or impropriety is wholly dependent upon the terms of the collective agreement and § 301 preempts any derivative tort claim that Petitioner would prefer to assert. As this Court stated in *Allis-Chalmers* v. *Lueck*, 471 U.S. 202, 219-20 (1985):

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge — in short, the whole range of disputes traditionally resolved through arbitration — could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, *Republic Steel Corp.* v. *Maddox*, [citations omitted], as well as eviscerate a central tenet of federal labor-contract law under § 301 that

> it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

This Court's reasoning in *Allis-Chalmers* applies with equal force to Petitioner's claim, and the writ should be denied.

B. The Right Petitioner Seeks To Assert Is Not A Non-Negotiable State Law Right That Exists Independent Of The Labor Agreement.

Petitioner contends that in *Allis-Chalmers* this Court announced a rule that "[n]on negotiable state-law (sic) rights and obligations which exist independent of the labor agreement will not be preempted" (Pet. 7), and that the decision of the Sixth Circuit Court of Appeals in this case ignores this principle. As demonstrated above, the claim is not independent of the labor agreement. Furthermore, it is not "non-negotiable." Petitioner and his union had the power, through grievance and arbitration, to dispute whether Petitioner's discharge was improperly procured by Seaboard. Petitioner's union negotiated contractual provisions that he could be discharged only for just cause, and that he could challenge his employer's decisions through a grievance resolution procedure. Similarly but more specifically, the Union could have negotiated for a provision prohibiting "customer preference" discharges. Thus, not only is Petitioner's general right to be discharged only for just cause a negotiated right, but the interrelated right he asserts to be free from contractual interference also is negotiable. As in *Allis-Chalmers*, 471 U.S. at 213, federal labor law preempts Petitioner's alleged 'right' to a cause of action against Seaboard because it is a right that "can be waived or altered by agreement of private parties".

C. Petitioner Is Not Without A Remedy.

Petitioner contends that § 301 can have no preemptive effect on his tortious interference claim because he otherwise would have no remedy against Seaboard. Parsec adopts

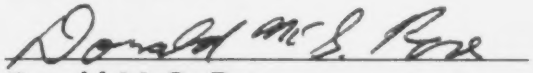
Seaboard's arguments at pages 8-9 of its Brief In Opposition that this issue was not raised below and is not one on which there exists any divergence of Circuit Court opinion.

In addition, Parsec submits that Petitioner in fact has a remedy for the alleged wrong. The labor agreement provides a grievance and arbitration remedy that permits him to claim that Seaboard's alleged interference with his employment was not just cause. § 301 provides a remedy if the arbitral process or his union's pursuit of his rights were flawed. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Vaca* v. *Sipes*, 386 U.S. 171 (1967).

CONCLUSION

For the reasons set forth above, Respondent, Parsec, Inc., respectfully submits that the writ should be denied.

Respectfully,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief For Respondent, Parsec, Inc. In Opposition were served by regular United States mail, first class, postage prepaid, this 25th day of November, 1987, upon:

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APPENDIX A

29 U.S.C. § 185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *

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